IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 75-927

PATRICIA HOGGE, EARLE PHILLIPS T/A
PARADISE MASSAGE PARLOR, AND BO-JAC, LTD.,
Petitioners,

v.

C.E. JOHNSON, CITY MANAGER, AND
PATRICK G. MINETTI,
CHIEF OF POLICE, CITY OF HAMPTON, VIRGINIA
EACH IN THEIR OFFICIAL CAPACITY,
Respondents,

SCARLETT ANNE HILLIARD AND EARLE PHILLIPS,
FRENCH MASSAGE PARLOR,
Petitioners,

v.

WILLIAM E. LAWSON, CITY MANAGER, AND
HOWARD B. BLACKMON, CHIEF OF POLICE, CITY OF
NEWPORT NEWS, VIRGINIA,
EACH IN THEIR INDIVIDUAL CAPACITY,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF THE CASE

The Councils of the Cities of Hampton and Newport News, Virginia, adopted ordinances regulating Massage Parlors on March 22, 1972 and March 27, 1972. On the date of the adoption of the Hampton, Virginia, ordinance Petitioners Bo-Jac, Ltd., T/A MISS MASSEUSE, filed a Notice of Application For Injunction in an equity action (Chancery Cause No. 10801) in the Virginia State Courts, praying for preliminary and permanent injunctions against the enforcement of the Hampton ordinance inasmuch the ordinance violated "... rights guaranteed us by the Constitution of the United States of America and the 1964 Federal Civil Rights Act". The state court denied a preliminary injunction by order entered March 29, 1972. Further application for preliminary injunction was made to Mr. Justice I'Anson of the Supreme Court of Virginia, but denied. Earle Phillips and Edwin Emerson (an original Plaintiff) were arrested in the month of April, 1972, and thereafter prosecuted for violation of the Massage Parlor ordinances of the two cities. In addition, numerous arrests and prosecutions arose from these Massage Parlors. See Memorandum Opinion of Judge Kellam (6a).

On April 3, 1972, Petitioners filed a complaint for the same preliminary and injunctive relief on the same constitutional and statutory grounds in the United States District Court for the Eastern District of Virginia. On July 24, 1972, District Judge Kellam denied injunctive relief and dismissed the complaint, ruling that the District Court was not a court of review over the decision of the Virginia Supreme Court in

Kisley v. Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972) and that the prior institution of the state actions invoked the principles of *Younger v. Harris*, 401 U.S. 37 (1971).

Petitioners appealed that decision to the United States Court of Appeals for the Fourth Circuit. The Hampton and Newport News cases were consolidated with *Joseph v. Louis Blair, Mayor of Falls Church, Virginia*. The Circuit Court of Appeals reversed the District Court in the Hampton and Newport News cases by decision dated July 26, 1973, ruling that the principles of *Younger v. Harris, supra*, were not applicable and that the *Kisley* case was not binding on them since the provisions of Title VII of the 1964 Civil Rights Act had not been asserted in that case. 472 F.2d 575 (1973). Rehearing was denied. 488 F.2d 403 (1973). Subsequent to the decision of the United States Fourth Circuit Court of Appeals, the Petitioners took a nonsuit in the State Court in the Hampton case. Petition For Writ of Certiorari by the Cities to this Court was denied. 410 U.S. 955 (1974).

Upon remand, the United States District Court conducted an extensive trial on the merits and dismissed the actions. Memorandum Order (1a-22a). The District Court found as fact that the evidence presented did not establish that the Plaintiffs met the test of the definition of "employer" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. By decision dated August 19, 1975, the Fourth Circuit Court of Appeals sustained the finding of fact of the District Court that the Petitioners had not met the definition of "employer" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and

found that the summary dismissal by this Court of an appeal from the Virginia Supreme Court, *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972), *app. dism.* 409 U.S. 907 (1972) ". . . is a perfectly clear precedent . . . ."

ARGUMENT

Each locality in these United States must maintain the flexibility to regulate the affairs of its community. In the cases at bar, these two communities adopted ordinances designed to regulate sexual misconduct occurring in the community. They were legislative acts by duly authorized legislative bodies and are entitled to the presumption of validity.

This case comes before this court for the second time on Petition for Writ of Certiorari from the Fourth Circuit Court of Appeals. As stated on page five of the Petition, the issues presented to the Circuit Court on the second appeal were as follows:

1) The ordinances violate the equal protection clause of the Fourteenth Amendment of the United States Constitution; and

2) The ordinances violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The basis of decision by the Circuit Court of Appeals, based upon the facts proved, was simple and concerned the following: The application of *Hicks v. Miranda*, 422 U.S. 322 (1975).

Furthermore, this Petition, if granted, would leave unanswered a significant statutory interpretation, i.e., the applicability of 42 U.S.C. § 2000e; and bring into consideration the principles of *Younger v. Harris*, 401 U.S. 36 (1971) which were also considered in *Hicks v. Miranda, supra.*

I.

THE COURT OF APPEALS PROPERLY APPLIED *HICKS V. MIRANDA*, 422 U.S. 322 (1975) IN THAT PRIOR RULINGS OF THIS COURT AS TO LACK OF A SUBSTANTIAL FEDERAL QUESTION ON THE ISSUE WAS A RULING ON THE MERITS WHICH THAT COURT SHOULD FOLLOW.

Your respondents faithfully argued to the Court of Appeals that the issues presented in this cause were the same as presented in similar cases which had been previously brought to this court, namely, *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168, 51 A.L.R. 3d, 929 (1972), *app. dism.* 409 U.S. 907 (1972), *Patterson v. City of Dallas*, 355 S.W.2d 838 (Tex. Civ. App. 1962) and *Rubenstein v. Township of Cherry Hill*, (n.j. 1974), *app. dism.* 417 U.S. 963 (1974). Other similar cases with additional side issues follow the logic and reasoning of the aforementioned cases, but the three abovementioned cases squarely presented the Equal Protection issue to this court.

In their petition, the petitioners assert that these ordinances violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Therefore, there were two issues presented in this case, one of which is controlled by *Hicks v. Miranda, supra.* The Circuit Court of Appeals considered the Equal Protection Clause issue to be properly disposed of as a result of following the precedents which had been set by this court when it reviewed *Kisley v. Falls Church, supra, Patterson v.*

Dallas, supra and *Rubenstein v. Township of Cherry Hill, supra,* within its obligatory jurisdiction. The Circuit Court quite correctly construed the ordinances adopted by the localities to have presented the issue of the Equal Protection Clause and found that by its dismissal for want of a substantial federal question, the United States Supreme Court had given precedence to the findings and declared that lower federal courts should not undertake to decide the issue unless directed by the United States Supreme Court. See *Heaney v. Allen,* 425 F.2d 869, 870-71 (2d Cir. 1970). The petitioners make issue of the various arguments that might be invented in disagreeing with *Kisley v. City of Falls Church, supra,* and the other cases, but the respondents respectfully submit that the Equal Protection Clause issue was squarely presented to and decided by the Virginia Supreme Court irrespective of any innovative new arguments that may not have been reported in the decision. The Virginia Supreme Court met the issue when it stated: "We do not agree with complainants' arguments that the ordinances deprive them of property rights without due process of law and deny them, and their employees, equal protection of the law." 212 Va. 696, 187 S.E.2d 168 (1972). That court then devoted at least a page in its decision to the issue, citing *Cheek v. City of Charlotte,* 273 N.C. 293, 297, 160 S.E.2d 18, 22 (1968); *Patterson v. City of Dallas,* 355 S.W.2d 838 (Tex. Civ. App. 1962) and *Ex Parte Maki,* 56 Cal. App. 2d 635, 133 P.2d 64 (1943) from which it adopted the following quote: "There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment." 212 Va. at 696, 187 S.E.2d at 171.

The question here is whether *Hicks v. Miranda, supra,* was properly applied by the United States Court of Appeals for the Fourth Circuit in this cause, not whether the ordinances themselves violated the Fourteenth Amendment to the United States Constitution. A reading of the *Kisley* decision shows that at least one of the main issues in that case was the same as the issue in the case at bar, i.e., whether the similar ordinances violated the Fourteenth Amendment. While, admittedly, the ordinances in this case are not verbatim with the ordinances in *Kisley* and *Patterson* but the pertinent *issue* is the same, and that is, whether such similar ordinances regulating commercial bisexual massage are unconstitutional under the Fourteenth Amendment. The Circuit Court reviewed the ordinances in the *Kisley* case and those in the case at bar and found them to be "substantially identical." (29a).

If there were any doubts that the *issue* was the same or that it had been actually faced by the ruling of this court in the *Kisley* case when it ruled that the case be dismissed for lack of a substantial federal question, such doubt should certainly be removed by the additional decisions of this court in *Smith v. Keaton,* 285 N.C. 530, 206 S.E.2d 203 (1974), *app. dismd.* 419 U.S. 1043; *Patterson v. City of Dallas,* 355 S.W.2d 838 (Tex. Civ. App. 1962) *app. dismd.* 372 U.S. 251 and *Rubenstein v. Township of Cherry Hill,* 417 U.S. 963 (1974). All of those cases in addition to *Kisley,* have been dismissed for want of a substantial federal question on the very *same* issue. The question in *Hicks v. Miranda,* 422 U.S. 322 (1975), is not whether an attorney in a state supreme court has properly presented full argument in his brief or in oral argument,

as would be suggested by the petitioners on page ten of their Petition. The question is whether as stated by this court, "A federal constitutional issue was properly presented . . . ." If the rule be as the petitioners contend, the innovative ability of the legal profession would negate the ruling in *Hicks*. After reading the *Kisley*, *Patterson* and *Smith* cases, cited above, the respondents say that there is no merit to the petitioners contention that the application of the Equal Protection Clause to ordinances similar to the ordinances in the case at bar (the ordinances are quoted in the various court opinions) was not properly presented as a federal constitutional issue to this court. The Fourth Circuit was correct when it recognized that this court had given precedence to the ruling on this same issue when it declared the issue to be unsubstantial even though the court had not given plenary consideration to the case.

In their arguments the petitioners say that the Circuit Court of Appeals should not have followed this court's ruling on the merits because "significant doctrinal developments have occurred." (13) This argument is derived from the court's approval of a quotation from *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 262 (2nd Cir. 1967). *Smith v. Keaton, supra*, dealt with the application of the Equal Protection Clause to a similar ordinance and the issue was deemed unsubstantial by this court in 1974. That decision was subsequent to *Reed v. Reed*, 404 U.S. 71 (1971) and *Fronterio v. Richardson*, 411 U.S. 677 (1973) cited by the petitioners as creating new significant doctrinal developments. The respondents submit there are no new significant doctrinal developments which would demand

the plenary consideration of a case in which the trial court found as fact: 1) That the Ordinance has created no problems for legitimately operated businesses (5a) and 2) The attraction of the massage parlors is sex, not massage (18a).

The respondents respectfully submit that if there was any conflict amongst the Circuits concerning the meaning of a dismissal for want of a substantial federal question, the conflict is resolved by the principles set forth in *Hicks v. Miranda, supra*, and that the Circuit Court of Appeals for the Fourth Circuit followed the accepted and usual course of judicial proceedings, rather than departing therefrom, by following those principles.

II.

THE PETITIONERS FAILED TO BRING THEMSELVES WITHIN THE PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e.

The second claim of the petitioners was that the Hampton, Virginia and Newport News Virginia ordinances were in conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and therefor must fall under the Supremacy Clause of the Constitution. Petitioners claim the ordinances force arbitrary sexual discrimination in the hiring and firing of massage parlor attendants.

42 U.S.C. § 2000e deals with definitions and 42 U.S.C. § 2000e(b) defines in part, the term "employer" as follows:

The term "employer" means a person engaged in

an industry affecting commerce who has *fifteen* or more employees *for each working day in each of twenty or more calendar weeks* in the current or preceding calendar year, and any agent of such a person . . . . (Emphasis added.)

42 U.S.C. § 2000e(g) defines the term "commerce" as follows:

> The term "commerce" means trade, traffic, commerce, transportation, transmission or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

The respondents asserted that before an employer is subject to the provisions of Title VII, he must come within the above definitions.

In the trial of the case in the District Court the petitioners offered no evidence to bring themselves within the Title VII provisions in proving their case, and while the District Court judge refused to sustain the motion of the respondents to strike the evidence as to this claim, allowing the petitioners ample opportunity to present such evidence as they desired after the respondents had presented their evidence, he found that they had not. In his Memorandum Order entered April 10, 1974, Judge Kellam stated (15a):

> However, the Court of Appeals directed this Court to conduct further proceedings in accordance with the views expressed in its opinion. In keeping with that direction, each side has been granted a full opportunity to present evidence and such argument as it desired.

After noting the objection of the respondents to the

failure of the petitioners to meet the definition of "employer", the trial judge who heard all of the evidence the parties desired to present found: "The evidence does not establish any of plaintiffs meet this test". The trial court did not find it necessary to proceed further and rule on the failure of the petitioners to show that they were in "commerce" as defined in the act since the petitioners had not met the definition of "employer".

In reviewing the record, the Circuit Court of Appeals noted the above quoted finding of the district judge and found: "The evidence is both conflicting and confusing, but there is substantial support for such a finding, and it is not clearly erroneous." (29a). The sole basis for both the district and circuit court rulings was not whether one could count employees in adjoining towns instead of the employees in the same place of business. Your respondents contended that the number of employees must be ". . . for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . " as is required by the statute, 42 U.S.C. § 2000e(b). The record reviewed by the Court of Appeals actually showed that the employment of these masseuses was rather temporary and varied depending upon the military pay day. These respondents further contend that the number was 25 because of the language of the 1972 Amendments to Title VII. See Brief of Appellee, Hogge v. Johnson, No. 74-1656, United States Court of Appeals, Fourth Circuit. The factual findings were made in the district court, reviewed by the Circuit Court and should be sustained.

The respondents submit that the petitioners are

seeking a factual review of the trial judge's findings in this court. It may be nice to know whether you can add numbers of employees in adjacent towns when the businesses have different names in order to meet the tests of "employer" under 42 U.S.C. § 2000e(b). However, the respondents submit that such would be an advisory opinion, not applicable to the facts of this case and something it would seem this court hardly has the time to do.

In their efforts to bring the Title VII provisions before the court the petitioners allude to a possible argument that the definition of employer under the provisions of Title VII constitutes an arbitrary classification in conflict with the Fifth Amendment's requirement of equal protection of the law. (18, fn 9). It is respectfully submitted that the attempt to raise that argument comes too late. The first the respondents heard of such a position was at the time of oral argument in the Circuit Court of Appeals. It would seem, nevertheless, that the Congress of the United States could define when the provisions of the Act would become effective, especially since it could act or not act as it saw fit and based as the Act is on the Commerce Clause of the Constitution.

III.

IF THE CIRCUIT COURT BE DIRECTED TO GIVE PLENARY CONSIDERATION TO THE CONSTITUTIONAL ISSUE, THE STATUTORY ISSUE MAY REMAIN UNRESOLVED.

Should the petitioners be right in their claim that the Circuit Court of Appeals should have given full consideration to their equal protection clause argument and not followed the precedents of this Court in the *Kisley*, *Patterson* and *Smith* cases, there would be the possibility of piecemeal appellate review. In view of the congested calendar of this court and the Circuit Court, it would seem more appropriate that if such a case is to be reviewed at all, the factual situation should be such that both the Equal Protection argument and the Title VII argument could be presented and considered at once.

Under the fact findings of this case, if the respondents be correct in their position that the ordinances are proper exercises of the police power and the proper exercise of the legislative prerogative, the question of their being in conflict with the provisions of Title VII of the 1964 Civil Right Act and thus invalid as a result of the operation of the Supremacy Clause would never be heard *under the facts of this case.* Thus, the respondents submit that, particularly since the trial court found that the ordinances were giving legitimate massage businesses no problem, this case is not such an important question of federal law that demands the immediate attention of this court. This is especially true since an additional examination

into the merits of the Equal Protection argument would be necessary and even then there is a likelihood that additional judicial proceedings will be necessary to determine the applicability of the provisions of Title VII, 1964 Civil Rights Act, 42 U.S.C. § 2000e.

IV.

THE PRINCIPLES OF *YOUNGER V. HARRIS*, 401 U.S. 37 (1971) AS EXPLAINED IN *HICKS V. MIRANDA*, *SUPRA*, MAKE IT INAPPROPRIATE TO TAKE JURISDICTION IN THIS CASE.

The basis for the original dismissal of this case by the district judge was the applicability of the principles of *Younger v. Harris*, 401 U.S. 37 (1971); *Samuel v. Mackell*, 401 U.S. (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); and *Perez v. Lesesma*, 401 U.S. 82 (1971). The United States Court of Appeals for the Fourth Circuit, on appeal of that dismissal, reversed the district judge, finding that the principles of the *Younger v. Harris, supra*, cases were not applicable since there were no pending criminal cases when the complaint was filed as it viewed the evidence. *Hogge v. City Council of Hampton*, 482 F.2d 575, *reh. den.* 488 F.2d 403 (4th Cir. 1973), *cert. den.* 416 U.S. 955 (1974).

It is true that a Petition for Writ of Certiorari was sought by these respondents in conjunction with the City of Falls Church (no longer a party to this litigation), and the petition was denied.

In their opposition to the petition filed by these respondents when the case was previously before the

court, the first and primary argument of the respondents (now petitioners) was:

> This case comes before this court from an interlocutory appeal of the Court of Appeals for the Fourth Circuit. The petitioners fail to state any grounds as to why the immediate intervention of the court is necessary or warranted and, in fact, the posture of the case in the courts below is such that adjudication may be had on the merits without any extraordinary inconvenience to any parties of the action.
>
> * * *
>
> The petitioners fail to give any reason why there is such a question of immediacy that this cause should be heard before adjudication on the merits.
>
> * * *
>
> There is no reason, therefore, to ignore the well recognized proscription against piecemeal review.

Brief For Respondents In Opposition For Writ Of Certiorari, No. 73-978, pp. 2 and 3.

The respondents to this petition would therefore submit that should the court be of the opinion that there was a substantial federal question before the Fourth Circuit on which it should have made a decision, that court should also give consideration to the respondents argument that the principles of *Younger v. Harris, supra*, and related cases dictate that the District Court was correct in dismissing the complaint initially. No reason is required for denial of writ of certiorari, but in that instance, there would be a subsequent opportunity to review, and therefore, no need to congest the court's calendar further.

The respondents submit that in view of this court's opinion in *Hicks v. Miranda, supra*, the District Court

was correct in refusing to take jurisdiction of these cases when he had found (7a):

> From the entire record in this case it is clear that at the time of institution of these actions, and at the time of this court's orders of dismissal, actions were pending in the State courts. In Hampton, a civil action for declaratory judgment and an injunction to enjoin enforcement of the Ordinance, and in Newport News, criminal prosecutions.

The Hampton and Newport News cases were consolidated for argument with cases from Norfolk and Falls Church, but in the Hampton and Newport News cases, the Fourth Circuit recognized that civil proceedings were pending in Hampton and criminal proceedings pending in Newport News. 482 F.2d 575 (1973). As found by the district judge, Theodore Edward Phillips, operator of French Massage Parlor, was arrested twice and found guilty of the Newport News ordinance, one arrest occurring April 29, 1972 (convicted May 11, 1972) and the other June 30, 1972 (convicted July 20, 1972). The original complaints in this cause were filed April 3, 1972. The order of dismissal was entered on July 25, 1972.

The Fourth Circuit placed great significance on the time of filing the actions. The respondents submit that the Fourth Circuit was in error in view of the holding of this court in *Hicks v. Miranda, supra.* It is respectfully submitted that the holding of *Hicks* justifies the dismissal by the district judge and that holding was stated by the court, 45 L.Ed.2d at 239, as follows:

> Neither *Steffel v. Thompson*, 415 U.S. 452, 39 L.Ed.2d 505, 94 S. Ct. 1209, nor any other case in this court has held that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed. Indeed, the issue has been left open; and we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.

The Memorandum Order of Judge Kellam, District Judge, entered on April 10, 1974, (1a), shows criminal prosecutions and civil actions seeking injunctions involving the plaintiffs or those in privy therewith, pending in these two cities before he had taken any action of substance when he dismissed the case by order entered July 25, 1972.

The respondents respectfully argue that, even if the Fourth Circuit was in error for sustaining the dismissal for want of a substantial federal question and/or in sustaining the fact finding of the district judge that the petitioners failed to bring themselves within the provisions of 42 U.S.C. § 2000e, *et seq.*, then the United States District Court for the Eastern District of Virginia was correct in dismissing the action based upon the principles of *Younger v. Harris, supra*, and related cases, as explained in the later case of *Hicks v. Miranda, supra.*

CONCLUSION

For these reasons, it is respectfully submitted that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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